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Supreme Court, U.S.
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No. 95-579

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, *et al.*,

Petitioners,

vs.

MICHAEL COOPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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16 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant Petitioner's writ of certiorari to determine whether the District Court of New Jersey properly held and the United States Court of Appeals for the Third Circuit properly affirmed that the plaintiff presented no evidence of invidious discriminatory animus behind the actions of the private parties involved and thereby properly dismissed Petitioner's 42 U.S.C. § 1985 claim against Respondents Mountainside Hospital and Ambulance Attendants Davis and Dan MacMahon (hereinafter the MICU defendants)?

2. Should this Court grant Petitioner's writ of certiorari to determine whether the District Court of New Jersey properly held and the United States Court of Appeals for the Third Circuit, properly affirmed that the MICU defendants, acting in their capacity as private, not-for-profit health care providers, were not state actors within the purview of 42 U.S.C. § 1983?

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I. Petitioner has failed to present a compelling reason for granting writ of certiorari inasmuch as the decision below, to dismiss petitioner's 42 U.S.C. § 1985 claim, is consistent with principals enumerated by this Court. 7

II. Petitioner's request for writ of certiorari should be denied inasmuch as the finding of the District Court and Court of Appeals, that the MICU defendants were not state actors subject to liability under § 1983, did not conflict with decisions of this Court or any other court of appeals. 9

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42 U.S.C. § 1985 ..... i, 3, 5, 6, 7

42 U.S.C. § 1985(3) 1

Respondents, Mountainside Hospital and MICU Attendants Davis and Dan MacMahon respectfully submit that Petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 26, 1995, be denied.

COUNTER-STATEMENT OF OPINIONS BELOW

Petitioner has provided complete and accurate copies of all opinions below in this matter. However, respondents, MICU defendants, would like to call to the Court's attention that the Order of Judge Bissell dated June 7, 1994 granting summary judgment, dismissed plaintiff's federal claims with prejudice but dismissed the state claims without prejudice. As such, plaintiff has filed a state claim in this matter which is currently pending in the Essex County, Law Division bearing Docket Number L-12659-94. This Complaint addresses the state claims, sounding in negligence, as well as an additional claim that Ann Perlmutter was denied her civil rights secured by the New Jersey State Constitution.

STATEMENT OF JURISDICTION

Petitioner's jurisdictional statement is complete and correct.

FEDERAL STATUTES INVOLVED

In addition, to the statutes provided in Petitioner's statement, Petitioner's claim against the MICU defendants is based upon 42 U.S.C. §1985(3) which states:

> If two or more person in any State of Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any

person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF FACTS

The within matter, from its inception has involved no novel questions or unique interpretations of the law. To the contrary, Respondents, MICU defendants have at all times asserted well

established principals of law: that as private, not-for-profit health care workers they are not subject to liability under 42 U.S.C. § 1983 and that there must be some showing of invidious discriminatory animus for liability to be had under 42 U.S.C. § 1985.

The defendant, Mountainside Hospital, is a private, not-for profit corporation organized exclusively for hospital purposes and duly licensed under the laws of the State of New Jersey. The MICU defendants are two of the paramedics employed by that hospital who staff its mobile intensive care unit. These parties have absolutely no involvement with any state agency other than the fact that they respond to medical emergencies if requested by local authorities. The MICU would similarly respond to an emergency medical request by a private citizen.

On May 20, 1989, sometime after 11:30 p.m., Ann Perlmutter crashed through the window of a basement apartment in Bloomfield, New Jersey wherein a Ms. Julia Sinauskas resided. Ms. Sinauskas, understandably very frightened by this intrusion, ran to the telephone to call the police. According to Ms. Sinauskas, while she was on the telephone, Ms. Perlmutter headed towards her, smearing blood on the walls and "bouncing" off each side of the hallway walls.

The Bloomfield police, the BVES and the MICU defendants were dispatched to that address. The police arrived first. According to deposition testimony, upon their entry into the apartment, the police officers observed Ann Perlmutter on the bedroom floor, thrashing around, kicking her legs, wildly swinging her arms and making unintelligible noises. In addition, the police officers observed blood on Ms. Perlmutter's arms, legs and head.

Ms. Perlmutter's behavior at that time was considered by at

least one police officer to be extremely violent. Irrespective of her irrational, combative and violent behavior, the police officers attempted to talk to and calm Ann Perlmutter so as to prevent her from further injuring herself or injuring others.

The attempts by the police to calm down Ann Perlmutter were unsuccessful. Just prior to the decision to use restraints, Ms. Perlmutter lunged at a free standing, full length mirror, kicked at the mirror and tried to crash it down on top of herself. In order to prevent her from further injuring herself or injuring others, the police, using their best judgment in light of the surrounding circumstances, restrained Ann Perlmutter by cuffing her hands behind her back and wrapping a bed sheet around her ankles.

A two member crew from the Bloomfield Volunteer Emergency Squad (hereinafter the BVES) were the next individuals to arrive at the apartment. The BVES crew assisted the police in placing Ann Perlmutter on a Reeves stretcher and then on a rolling cot stretcher. The MICU paramedics were the last to arrive at the scene.

During this entire time period, Ann Perlmutter was continually combative and verbally abusive towards those individuals attempting to assist her. In fact, Ms. Perlmutter's behavior, which at this point included attempts to bite people that had their hands near her face, prevented any medical assessment or assistance to be administered by either the BVES crew or MICU attendants.

Ann Perlmutter was removed from the apartment on the rolling stretcher and transported to the waiting ambulance. As Ms. Perlmutter was being wheeled towards the ambulance she suddenly became quiet, causing the BVES and MICU personnel who were monitoring her condition to immediately respond and determine the reason for this occurrence. Upon discovering that Ms. Perlmutter had stopped breathing, the BVES crew and the

MICU paramedics immediately reacted by releasing all restraints and providing advanced life saving procedures.

Ms. Perlmutter was transferred to Clara Maass Hospital where she never regained consciousness. She died several days later. The autopsy report indicated traces of cocaine in her blood.

Dr. Barbara Lee Perlmutter, mother of decedent, brought suit against, *inter alia*, the Bloomfield Police Department, the Bloomfield Voluntary Emergency Squad, Mountainside Hospital, the Mountainside Intensive Care Unit and other individuals who participated in the incident that evening. The Petitioner charged the MICU defendants with medical malpractice resulting in wrongful death, and deprivation of constitutional rights pursuant to 42 U.S.C. § 1985 and 42 U.S.C. § 1983.

The District Court dismissed plaintiff's 42 U.S.C. § 1983 claim against the MICU defendants as these defendants are not-for-profit, private, health care workers, clearly not state actors and not operating under the color of state. As such the MICU defendants are not subject to liability under 42 U.S.C. § 1983. In addition, the District Court found the MICU defendants not subject to liability under 42 U.S.C. § 1985 as Petitioner failed to produce any evidence of invidious discriminatory animus behind the MICU defendants' actions required to sustain this claim.

Petitioner's brief in support of this writ for certiorari attempts to include the "ambulance personnel" under the umbrella of § 1983 liability for "standing by" while other officers "summarily punish" a third person within his or her presence or knowledge. Petitioner ignores the obvious flaw in this argument in that as private health care workers the MICU defendants cannot be liable under § 1983.

Petitioner simply cannot accept the fact that the harm which befell her daughter was not a result of any discriminatory act by the MICU defendants. If Petitioner has any legitimate claim, and Respondents contend otherwise, it is one of negligence which should be appropriately pursued in the pending state Court action.

REASONS FOR DENYING THE WRIT

Petitioner argues that certiorari should be granted in this matter as the court below has entered a decision in conflict with the decision of other United States Courts of Appeals on the same important issue. Petitioner, however, points to no conflicting case law on the issues for which summary judgment was granted on behalf of the MICU defendants.

This Court has clearly enunciated in previous decisions that for liability to be found under § 1985 there must be some evidence of invidious discriminatory animus behind the actions of the alleged conspirators. *Griffin v. Breckenridge*, 403 U.S. 88 (1970). In addition, this Court had held on numerous occasions that for liability to attach under § 1983 a person must be engaged in the complained of activity "under color" of the state. *Rendell-Baker, et al. v. Kohn, et al.*, 457 U.S. 830 (1982).

The decision of the District Court, affirmed by the Court of Appeals, regarding the MICU defendants did not in any way conflict with the decisions of other United States Courts of Appeals or with this Court. As such, it is respectfully requested

I.

PETITIONER HAS FAILED TO PRESENT A COMPELLING REASON FOR GRANTING WRIT OF CERTIORARI INASMUCH AS THE DECISION BELOW, TO DISMISS PETITIONER'S 42 U.S.C. § 1985 CLAIM, IS CONSISTENT WITH PRINCIPALS ENUMERATED BY THIS COURT.

Petitioner charged the defendants with conspiracy to interfere with Ann Perlmutter's civil rights under 42 U.S.C. § 1985. Petitioner, however, failed to advance the requisite evidence of a discriminatory animus. In *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1970) this Court articulated that while the legislative intent of this statute "was meant to reach private action [it] does not, however mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." In order to distinguish when this statute applies, this Court required an element of some racial or other class based discriminatory intent or animus.

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action.

Id. at 102.

In *Griffin*, the type of alleged conduct which was found to rise to the level of a conspiracy, involved the defendants forcing the plaintiffs out of their automobile, "wilfully, intentionally and maliciously menanc[ing] and assault[ing] each of the plaintiffs by pointing firearms and wielding deadly blackjacks, pipes or

other kind of clubs, while uttering threats to kill and injure said plaintiffs." *Id.* at 91.

In the instant matter, petitioner alleges the existence of a conspiracy based upon the fact that the MICU defendants coordinated services with the Bloomfield Police Department. In his opinion of June 7, 1994, the Honorable John W. Bissell, U.S.D.J. found that "the existence of these communications do not establish the discriminatory intent necessary to establish a § 1985 conspiracy." (App. 46). This ruling is consistent with the principles applied by other United States Courts of Appeals.

In *Plasko v. City of Pottsville*, 853 F. Supp. 1258, 1267 (E.D. Pa. 1994), the court stated that:

> In order to state a cause of action for violations of this [a § 1985] section, the following must be alleged: (1) a conspiracy by the defendants; (2) designed to deprive plaintiff of the equal protection of the laws; (3) the commission of an overt act in furtherance of that conspiracy; (4) a resultant injury to person or property or a deprivation of any right or privilege of citizens; and (5) defendants' actions were motivated by a racial or otherwise class based invidiously discriminatory animus. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798-1799, 29 L.Ed.2d 338 (1971); *Robison v. Canterbury Village, Inc.* 848 F.2d 424, 430 (3rd Cir. 1988) (racial or other prohibited animus necessary element of section 1985(3) claim; Section 1986 claim companion to Section 1985(3) claim); *Pratt v. Thornburgh*, 807 F.2d 355, 357 (3rd Cir. 1986).

Petitioner failed to produce even a scintilla of evidence demonstrating that the MICU defendants were involved in a conspiracy designed to purposefully deprive Ann Perlmutter of her civil rights as a result of some deep-seated, racially motivated resentment or hostility. In the absence of this evidence, summary judgment of this claim was appropriate.

II.

PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED INASMUCH AS THE FINDING OF THE DISTRICT COURT AND COURT OF APPEALS, THAT THE MICU DEFENDANTS WERE NOT STATE ACTORS SUBJECT TO LIABILITY UNDER § 1983, DID NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

It is a well established principal that for liability to attach under 42 U.S.C. § 1983 a person must be engaged in the complained of activity "under color" of the state.

Citing *United States v. Price*, 383 U.S. 787, 794 (1966) this Court in *Rendell-Baker, et al. v. Kohn, et al.*, 457 U.S. 830, 838 (1982) stated that:

> In cases under § 1983, "under color", of law has consistently been treated as the same thing as "state action" required under the Fourteenth Amendment.

This Court in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), held that state regulation is not enough to prove state action but that:

> The complaining party must also show that there is a sufficiently close nexus between the

> State and the challenged action of the regulated entity so that the actions of the latter may be fairly treated as that of the State itself. (cite omitted)

This Court went on to say that this nexus can exist.

> When [the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, the that choice must in law be deemed to be that of the State . . .[or] the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State. (cite omitted)

Blum at 1004-1005.

In the instant action, Petitioner has failed to provide any evidence to indicate that the State, acting through the Bloomfield Police Department, exercised coercive power over the MICU defendants or conversely that the MICU defendants coerced the police into any action. To the contrary, the record showed that each entity had its own individual function when responding to an emergency situation. Specifically, the police are responsible, if necessary, for securing or subduing a patient; the BVES personnel are responsible for transportation of the patient; and the MICU Paramedics are responsible for the medical control or treatment of the patient.

Judge Bissell, in his decision of June 7, 1994 stated that the reasons "which prevented § 1983 liability from attaching to BVES, prohibits § 1983 liability from attaching to the Mountainside defendant." (App. 48). Judge Bissell opined that the decisive inquiry in determining § 1983 liability was whether

the defendants were engaged in activity traditionally a function of the state. (App. 14). Judge Bissell held that "the plaintiff has not brought forward any evidence that emergency services are traditionally a function of the state. Furthermore, numerous other courts have found that ambulance/emergency services are not traditionally functions of the state. *See McKinney v. West End Voluntary Ambulance Association*, 821 F. Supp. 1013, 1018 (E.D. Pa. 1992); *Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F. Supp. 770, 773 (D. Md. 1984); *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344, 1350-51 (E.D. Va. 1983). Therefore, BVES [and subsequently MICU] and its members are not state actors." (App. 14-15). The Court of Appeals affirmed Judge Bissell's decision, a decision which involves no conflict with existing law.

CONCLUSION

Petitioner has set forth no compelling reason for the writ of certiorari to be granted. The decision of the District Court, affirmed by the Court of Appeals is consistent with the decision of this Court as well as other United States Courts of Appeals. Petitioner's dissatisfaction with the prior decision is no basis for this Court to grant certiorari and as such it is respectfully requested that Petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 26, 1995, be denied.

Respectfully submitted,

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